UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF ILLINOIS

EASTERN DIVISION

LAWRENCE E. JAFFE PENSION PLAN, On Behalf of Itself and All Others Similarly Situated, Plaintiff, vs. HOUSEHOLD INTERNATIONAL, INC., et al., Defendants.	Lead Case No. 02-C-5893 (Consolidated) CLASS ACTION The Honorable Jorge L. Alonso

CLASS MEMBER KEVIN P. McDONALD'S OPPOSITION TO MOTION FOR APPEAL BOND

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I. INTRODUCTION AND SUMMARY OF ARGUMENT

Appellant Kevin McDonald opposes Plaintiffs' motion for an appellate bond under Fed. R. App. P. 7. McDonald timely objected to the settlement and attorneys' fees request below, as authorized by subsections (e)(5) and (h)(2) of Rule 23 of the Federal Rules of Civil Procedure. When his objections were overruled, he filed a notice of appeal as authorized by the Supreme Court's decision in *Devlin v. Scardelletti*, 536 U.S. 1, 8 (2002). Plaintiffs now seek to quash McDonald's appeal by requiring McDonald to post an appellate bond comprising: (1) $500 in expected appellate expenses of the type enumerated under Fed. R.App. P. 39(e). Dkt. 2276 (Brooks Decl.) at 2, ¶4 (estimating that "costs taxable under Rule 39 will amount to approximately $500 for Objector's appeal."); (2) $30,000 in estimated "administrative costs" involving "communications with Class Members and counsel" and "case management and systems maintenance costs," Dkt. 2277 (Joaquin Decl.) at 3 ¶4; and (3) $4,221,000 in "lost interest" for the anticipated duration of the appeal, with the rate calculated as the difference between the rate presently being obtained and the statutory post-judgment interest rate specified in 28 U.S.C. §1961(a). Dkt. 2276 (Brooks Decl.) at 2-3, ¶¶6-9, applied to the entire $1.575 billion fund. *Id*., ¶9.

Of these categories, only the first can be the subject of an appellate bond in this case. As Plaintiffs point out, their legitimate appellate costs under Rule 39 would be approximately $500. The remainder of the request includes a bond to cover administrative expenses and "lost" interest on the remainder of the fund, in addition to what it is presently earning.

The most glaring indication that the request is meritless is the fact that Plaintiffs seek a bond for interest on over $420 million in attorneys' fees and expenses that were subject to a "quick pay" provision and have already been distributed.[1] Lead Counsel made sure that they –

[1] Lead Counsel were awarded fees of 24.68% of the $1,575,000,000 class fund ($388,710,000.00) and expenses of $33,605,429.48. Dkt. 2265 at 2. That award was to be paid immediately after the order, as specified in the settlement, despite any appeal. Dkt. 2265 at 4 ("The awarded attorneys' fees and expenses, and interest earned thereon, shall be paid to Lead Counsel from the Settlement Fund immediately after the date this Order is executed subject to the terms, conditions, and obligations of the Stipulation, which terms, conditions, and obligations are incorporated herein."). The named plaintiffs were awarded expense reimbursements totaling $40,685.57. *Id*. at 4.

unlike the class – would get paid even in the event of an appeal. For those funds, there is no delay in payment.

That dishonest attempt at inflating the bond is ultimately immaterial, because there is the complete lack of support for imposing a bond for *any* administrative expenses or interest in this case. The scale of a Rule 7 bond necessarily must relate to costs the prevailing appellee would actually be entitled to obtain if the appeal is lost. "Thus, '[c]osts for which a Rule 7 bond can be required include only costs relating to the appeal,'…that is, costs which 'the appellee stands to have reimbursed' should he prevail on appeal," *Tennille v. Western Union Co.,* 774 F.3d 1249, 125435-56 (10th Cir. 2014) quoting *Adsani v. Miller*, 139 F.3d 67, 75 (2d Cir.1998); *see also* Newberg on Class Actions § 14:16 (5th ed.) ("[T]he amount of the bond should have some relationship to the costs that a losing appellant would have to shoulder."). Plaintiffs omit to point out that Circuit courts have consistently refused to approve bonds under Rule 7 that include interest or other expenses, where there is no statutory authority or where the parties have agreed in the settlement that the fund will not be distributed until after any appeal is resolved. *See Pedraza v. United Guar. Corp.,* 313 F.3d 1323, 1333 (11th Cir. 2002); *Tennille,* 774 F.3d at 1255-56. Plaintiffs' unexplained attempt to apply the post-judgment interest statute is improper for the same reasons. The statute does not apply to stipulated class settlements approved by a district court, much less to absent class members who appeal. Plaintiffs' argument for a bond to cover "lost" interest on the settlement fund under Rule 7 is essentially an attempt to obtain the equivalent of a supersedeas bond where such relief does not lie.

Conscious of the legal infirmity of their request, Plaintiffs implicitly request that this Court impose the requested bond solely because the appeal is frivolous or in bad faith. Plaintiffs do not remotely meet the standard for demonstrating bad faith. Their central support is the charge that McDonald may not have standing to appeal. First Plaintiffs say that, because McDonald did not intervene, his appeal is deemed limited to his own interests. Assuming arguendo that is true, then Plaintiffs' bond motion is frivolous on its face, because McDonald's appeal would not delay anything.

But Plaintiffs proceed nonetheless, saying that McDonald may not be a class member – despite McDonald having established it and Plaintiffs having conceded it – apparently because he didn't seek to intervene when he learned there were duplicate claims on his behalf. Plaintiffs' argument is so unconvincing that Plaintiffs don't even bother to complete it, instead warning they might "explore his status more fully in future filings." To say the least, an inchoate argument that contradicts the record does not support the conclusion that McDonald is pursuing the case in bad faith. Plaintiffs' request for a bond as a sanction for imaginary misconduct is meritless, and overtly interposed for the improper purpose of blocking appellate review of this Court's rulings.

In the end, the only bondable expenses are likely to be the standard, enumerated Rule 39(e) costs of about $500. As such, the Court should question whether the effort of bonding potential expenses of a few hundred dollars – in the absence of any indication that McDonald would refuse to pay them if Lead Counsel bothered to demand them – is worth the candle.

II. ARGUMENT

A. There is No Delay in the Payment of Class Counsel's Fees and Expenses

As a preliminary matter, McDonald notes that Plaintiffs seek a bond for delay in payment on the ***entire*** fund of 1.575 billion dollars.[2] But the substantial portion of the fund allocated to attorneys' fees, costs, and expenses is not subject to any delay from the appeal. Under the settlement's terms, Lead Counsel are to be paid immediately. Dkt. 2213 at 18, ¶¶6.2-6.3. Lead Counsel know this, and yet unabashedly ask this Court to bond interest on the entire fund, including over $420 million in fees and expenses presently in their possession, for a nonexistent delay in payment. That overreach is revealing. Plaintiffs are not interested in securing payment of legitimate costs that might actually accrue; they just want to impose an insurmountable financial burden on McDonald to stop appellate review.

[2] Dkt. 2276 at 3, ¶9 (Brooks Decl.) ("Applying the 0.62% interest rate for 9.6 months to the $1.575 billion in [*sic*]Settlement Fund, less the amount of interest the cash is generating pursuant to the Settlement Agreement (0.285%), results in $4,221,000 in expected lost interest.").

This fact also reveals the fault in Lead Counsel's hackneyed insinuations about the motivations of McDonald's counsel.[3] Because Lead Counsel will not be denied any funds during the appeal, they have no reason to offer to "pay off" the objectors' counsel to eliminate the appeal. *See* Brian T. Fitzpatrick, *The End of Objector Blackmail?*, 62 VAND. L. REV. 1623, 1625-26 (arguing appeal bonds to be too draconian a means of controlling objector "blackmail" over attorneys' fees awards, and asserting that the practice of permitting quick-pay provisions is a superior method.) And, if McDonald prevails in challenging the fee, the difference between the fee awarded and a reasonable fee on remand could exceed $100 or even $200 million, justifying a substantial fee to his counsel that would surely exceed any amount Lead Counsel might offer to dismiss the appeal, given that they harbor great confidence in the fee being upheld.

B. Plaintiffs are not Entitled to a Rule 7 Bond for "Administrative Expenses" or Post-Judgment Interest

Federal Rule of Appellate Procedure 7 provides in pertinent part: "In a civil case, the district court may require an appellant to file a bond or provide other security in any form and amount necessary *to ensure payment of costs on appeal.*" Fed. R. App. P. 7 (emphasis added). In most cases, the primary element covered by the term "costs on appeal" is the expense, under Rule 39, of copying the appellate briefs and appendix. Beyond that, additional "costs" sometimes may be specifically authorized by statute or rule, and thus bondable. *See Pedraza v. United Guar. Corp.*, 313 F.3d 1323, 1333 (11th Cir. 2002); *Tennille*, 774 F.3d at 1255-56 (10th Cir. 2014). Though they differ on some other points, all "circuit courts addressing the meaning of 'costs on appeal' have consistently linked that phrase to costs that a successful appellate litigant can recover pursuant to a specific rule or statute." *Id.* at 1254. Costs that are not statutorily recoverable against an appealing class member are not properly subject to a bond.

[3] Plaintiffs make scattered references to the fact that McDonald's counsel have represented objectors in other cases. That is no evidence of bad faith, and to punish McDonald merely because his lawyers have represented objectors before is both illogical and a violation of due process. *See Vollmer v. Selden*, 350 F.3d 656, 662 (7th Cir. 2003) (district court could not infer improper motivation from prior representations not found to be frivolous or improperly motivated); *In re Bayer Corp. Combination Aspirin Prod. Mktg. and Sales Practices Litig.*, 2013 WL 4735641, *2 (E.D. N.Y. 2013) (A history of objecting to class action settlements "alone is not indicia of bad faith or vexatious conduct.").

Plaintiffs' bid for "increased administrative costs" resulting from the appeal is a perfect example. None of the statutes Plaintiffs proceeded under, even if they permit recovery of costs from an adjudicated violator, allows for an award of costs from an absent member of the plaintiff class – such as McDonald – in the first place.[4] Plaintiff identifies no other statute or rule that includes administrative expenses in the "costs" that may be recovered or taxed on appeal. That is fatal to Plaintiffs' motion to bond those expenses. As the Tenth Circuit explained in *Tennille*:

> Circuit courts, in any event, consistently define "costs on appeal" for Rule 7 purposes as appellate costs expressly provided for by a rule or statute. But Plaintiffs have not identified, nor could we find, any rule or statute that permits them, should they succeed in defending Objectors' merits appeals . . . to recover the cost of maintaining the class settlement fund pending the merits appeals. Therefore, the district court erred in requiring Objectors to post an appeal bond covering these costs.

Tennille, 774 F.3d at 1255. "What Plaintiffs really appear to be seeking is an appeal bond that includes damages due to the delay Objectors' merits appeals might cause. But that is not the purpose of a Rule 7 bond." *Id.* at 1256. "Although Plaintiffs can point to several unreported district court cases imposing appeal bonds that cover delay damages or increased administrative costs to maintain a class settlement pending appeal, we do not find the reasoning of those cases persuasive in light of the unanimous circuit authority restricting an appeal bond to costs expressly permitted by rule or statute." *Id.* at 1256.

Despite the smattering of district court authority Plaintiffs proffer, the majority of courts expressly do not permit interest on the fund to be bonded as a compensable Rule 7 cost. *See, e.g., Eastwood Enterprises, LLC v. Farha*, No. 8:07-CV-1940-T-33EAJ, 2011 WL 2681915, at *2 (M.D. Fla. July 11, 2011) (observing that the "clear majority" of Second Circuit cases "hold that damages for delay cannot be included in Rule 7 bonds where no underlying statute provides for the inclusion of such costs" and rejecting district court cases holding otherwise, such as *In re*

[4] *See Young v. New Process Steel, LP*, 419 F.3d 1201, 1205 (11th Cir. 2005) (court must honor statute imposing different standards on plaintiffs and defendants for the award of costs and fees); *Azizian v. Federated Dept. Stores*, 499 F.3d 950, 959-60 (9th Cir. 2007) (where statute permitted prevailing plaintiff to recover "the cost of suit, including a reasonable attorney's fee," district court could not require an objecting class member to post a bond for attorneys' fees on appeal because, under the statute, "a district court can order only a losing defendant – the party that has violated the antitrust laws – to pay attorney's fees….").

Compact Disc Minimum Advertised Price Antitrust Litig., No. MDL 1361, 2003 WL 22417252, at *1 (D.Me. Oct.7, 2003) and *In re NASDAQ Market–Makers Antitrust Litig.*, 187 F.R.D. 124, 128 (S.D.N.Y.1999); *MercExchange, L.L.C. v. eBay, Inc.*, 660 F. Supp. 2d 653, 660 & n.8 (E.D. Va. 2007) (given *Pedraza's* requirement of justifying a bond for attorneys' fees under a statute or other exception to the American Rule, "to justify requiring . . . a bond covering the judgment itself—and not simply attorneys' fees—would require a set of exceptional facts not found in this case."); *See also In re Navistar Diesel Engine Prod. Liab. Litig.*, No. 11 C 2496, 2013 WL 4052673, at *2 (N.D. Ill. Aug. 12, 2013) (concluding Rule 7 does not permit a court to require an appeal bond for extra administrative costs that otherwise would not be incurred, and finding unpersuasive the contrary results in cases such as *Heekin v. Anthem, Inc.*, No. 1:05–cv–01908–TWP, 2013 WL 752637, at *1–2 (S.D.Ind. Feb. 27, 2013) and *In re Uponor, Inc. F1807 Plumbing Fittings Products Liab. Litig.*, No. 11–MD–2247 ADM/JJK, 2012 WL 3984542, at *2 (D.Minn. Sept. 11, 2012); *see also In re Navistar*, 2013 WL 4052673, at *3 n.1 (noting that "plaintiffs could have negotiated for a fee and expense award that expressly covered any additional administrative costs resulting from an appeal" but failed to); *In re Toyota Motor Corp. Unintended Acceleration Mktg., Sales Practices, & Prod. Liab. Litig.*, No. 8:10ML02151 JVS FMOX, 2013 WL 5775118, at *3 (C.D. Cal. Oct. 21, 2013) (concluding that absence of statutory authorization "precludes inclusion of increased settlement administration costs in the amount of a bond imposed on appeal"); *Eastwood Enters.*, 2011 WL 2681915, at *1 (questioning bond for prospective damages in *Allapattah Servs.*, 91–0986–CIV, 2006 WL 1132371, at *18 (S.D.Fla. Apr.7, 2006), because the Eleventh Circuit's decision in *Pedraza* "did not address or approve including potential damages to a class in an appeal bond.").

What Plaintiff really is seeking is the equivalent of a supersedeas bond under Fed. R. App. P. 8.[5] *See, e.g., In re Enfamil LIPIL Mktg. & Sales Practices Litig.* MDL 2222, No. 11-MD-02222, 2012 WL 1189763, at *2-3 (S.D. Fla. Apr. 9, 2012) (refusing interest bond under

[5] Rule 8 specifies that a party seeking "a stay of the judgment or order of a district court pending appeal" ordinarily should seek relief first in the district court. Fed. R. App. P. 8(a)(1)(A). Federal Rule of Civil Procedure 62(d) specifies that "the appellant may obtain a stay by supersedeas bond."

Rule 7 "where no underlying statute provides for the inclusion of such costs" and distinguishing the interest bond in *Checking Overdraft* as one sought under Rule 8). But a supersedeas bond under Rule 8 cannot serve Plaintiffs' purpose either, because McDonald is not seeking a stay of the judgment pending appeal, and appellees cannot seek a stay of judgment, much less demand that it be bonded by an appellant who desires no stay.

Nor is it accurate to say that the appeal somehow amounts to a de facto stay of the judgment. The parties to the settlement here agreed that their settlement would not become effective until all appeals are resolved. *See* Dkt. 2213 at ¶1.7. In such a case, there is no need for a stay of execution, and thus no basis for requiring any supersedeas bond. *See,Tenille v. W. Union Co.*, 774 F.3d 1249, 1256 & n.5 (explaining that a supersedeas bond did not lie when "there is no judgment yet to be stayed pending Objectors' merits appeals" because the settling parties "expressly provided that their settlement would not become effective until all appeals challenging the settlement are resolved"); *accord Vaughn v. American Honda Motor*, 507 F.3d 295, 298-99 & n.6 (5th Cir. 2007).[6]

Even more fundamentally, and regardless of any statutory entitlement, under the settlement's provisions interest is not an item of "damages" that Appellant would owe to the class on any theory, even if he loses the appeal. *In re Enfamil LIPIL Mktg. & Sales Practices Litig. MDL 2222*, No. 11-MD-02222, 2012 WL 1189763, at *3 & n.2 (S.D. Fla. Apr. 9, 2012) (distinguishing *Allpattah Services, Inc. v. Exxon Corp.*, No. 91–0986–CIV, 2006 WL 113271, at *18 (S.D.Fla. Apr. 7, 2006) and holding that "'[i]f claims are not being paid while appeals are pending, it is solely because the Appellees agreed to that limitation in their settlement instead of insisting that class members be entitled to interest during a pending appeal'"); *In re Am. Inv'rs*

[6] *See also U.S. for Use of Terry Inv. Co. v. United Funding & Inv'rs, Inc.*, 800 F. Supp. 879, 880–81 (E.D. Cal. 1992) (rejecting argument that Plaintiffs' inability to enforce judgment was a *de facto* stay permitting court to impose a supersedeas bond on the motion of appellee); *In re Diet Drugs (Phentermine, Fenfluramine, Dexfenfluramine) Prod. Liab. Litig.*, No. CIV.A. 99-20593, 2000 WL 1665134, at *3 (E.D. Pa. Nov. 6, 2000) ("Although the consequences of an appeal from approval of a class action settlement may be similar to a stay, the court nevertheless concludes that it has no authority to impose a supersedeas bond in the absence of an appellant's motion for a formal stay of execution.").

Life Ins. Co. Annuity Mktg. & Sales Practices Litig., 695 F. Supp. 2d 157, 166 (E.D. Pa. 2010) (refusing to bond delay costs because "the settlement agreement already contemplates the harm to the class upon an appeal because it allows the defendants to wait to implement the settlement until all appeals are complete. . . . It appears, then, that the benefits to the class under the settlement already capture the costs of delay incident to an appeal").

This conclusion is even more compelling when the settlement actually provides for the funds to be kept in a designated interest-bearing account, as this settlement does. That bespeaks a conscious determination by the parties of the interest due to the class pending distribution. *In re Connaught Properties, Inc.*, 176 B.R. 678, 685 (Bankr. D. Conn. 1995) ("The amount of post-judgment interest is often negotiated in the course of settlement discussions and was apparently considered by the district court in approving the Stipulation."); *cf. Vaughn*, 507 F.3d at 298-99 & n.6, (concluding, where settlement made no provision for interest, and did not become effective until the conclusion of the appeals, that "[t]he parties to the settlement thus agreed that the financial time-value of the benefits to be paid under the settlement is not to be awarded to the plaintiffs."). There is certainly no provision for demanding additional interest in such a case.

C. 28 U.S.C. §1961(a) Does Not Apply

Lead Counsel calculated the "additional delay" or "lost interest" amount by using the statutory post-judgment interest rate from 28 U.S.C. §1961(a). Dkt. 2276 (Brooks Decl.) at 2, ¶6. That statute does not render interest an item of "costs" bondable under Rule 7. Plaintiffs never bother to explain why or how that statute could apply.

The statute manifestly does not apply. It does not apply to McDonald, who is not the judgment debtor in the case, much less an "adjudicated wrongdoer" who will unjustly have possession and use of funds rightfully belonging to someone else. *Coston v. Plitt Theatres, Inc.*, 727 F. Supp. 385, 392–93 (N.D. Ill. 1989) (denying post-judgment interest for discrimination claim resolved by settlement; where claimant's earlier adjudicated victory had been vacated, settling defendant was not an adjudicated wrongdoer subject to payment of interest); *Devex Corp. v. Gen. Motors Corp.*, 579 F. Supp. 690, 698 (D. Del.) (post-judgment interest

compensates not just delay from a defendant's appeal, but the defendant's wrongful conduct that brought about liability), *aff'd*, 746 F.2d 1466 (3d Cir. 1984), and *aff'd sub nom. Appeal of Tegrothenhuis*, 746 F.2d 1468 (3d Cir. 1984), and *aff'd sub nom. Appeal of Ziesenheim*, 746 F.2d 1469 (3d Cir. 1984).

Indeed, the statute does not apply to anyone in the case at this point, because it resolved as a classwide settlement. "[Section] 1961 was not intended to apply and will not be interpreted to extend to court-approved settlement agreements." *Coston*, 727 F. Supp. at 392–93, quoting and discussing *Kincade v. Gen. Tire and Rubber Co.*, 540 F.Supp. 115 (W.D.Tex.1982), *rev'd on other grounds*, 716 F.2d 319 (5th Cir.1983); *see also Ocasek v. Manville Corp. Asbestos Disease Comp. Fund*, 956 F.2d 152, 154 (7th Cir. 1992) (bankruptcy reorganization plan, and not 28 U.S.C. §1961, "controlled distribution of any interest on awards" to claimants from fund).

Finally, interest ceases accruing under §1961(a) when a defendant pays over the money or deposits it in court, which has already happened here pursuant to the settlement. *Cordero v. De Jesus-Mendez*, 922 F.2d 11, 18–19 (1st Cir. 1990); *see also* Dkt. 2275 at 18, n.8 (defendants "have turned over the money."). After that, there is no liability for further interest, even if there is a delay in the receipt of the money by the rightful recipient. *United States v. Bank of Celina*, 823 F.2d 911, 915 (6th Cir. 1986). For all of these reasons, there is no cognizable "lost interest" or delay damages that would be imposed upon McDonald were his appeal to fail.

D. This Court Should Not Seek to Foreclose Appellate Review of Its Work by Imposing an Exorbitant Bond that Includes Unsupportable Costs

In the end, Plaintiffs do not really pretend that there is intrinsic statutory authority in this case to support a bond for administrative expenses and interest. Plaintiffs' motion is overtly based on the premise that this Court should require a very large bond if it believes an appeal is meritless, so as to "discourage frivolous appeals." Dkt. 2275 at 6; *see also id.* at 2, 3 (citing 28 U.S.C. §§1912, 1927 and Fed. R. App. P. 38 as the basis for the bond motion under Rule 7). It would be a gross misuse of Rule 7 to impose a large bond in order to block appellate review of the Court's judgment and orders, particularly on the anemic showing made here.

Despite Plaintiffs' breezy assurance, district courts are forbidden from imposing large bonds merely because they believe an appeal might lack merit. The Seventh Circuit has explicitly held that this is an impermissible ground for deterring appeals. The fact that an objector is seeking appellate review that may lead to "correction of a district court's errors is a benefit to the class." *Crawford v. Equifax Payment Svcs., Inc.*, 201 F.3d 877, 881 (7th Cir. 2000) (Easterbrook, J.); "A district judge ought not try to insulate his decisions from appellate review by preventing a person from acquiring a status essential to that review." *Robert F. Booth Trust v. Crowley*, 687 F.3d 314, 318 (7th Cir. 2012) (Easterbrook J.) (*citing Crawford*, 201 F.3d at 881); a*ccord Azizian*, 499 F.3d at 961 ("[A]ny attempt by a court at preventing an appeal is unwarranted and cannot be tolerated." (*quoting Adsani v. Miller*, 139 F.3d 67, 79 (2d Cir. 1998)). *See also Vaughn*, 507 F.3d at 299 (warning against excessive bonds because "imposing too great a burden on an objector's right to appeal may discourage meritorious appeals or tend to insulate a district court judgment in approving a class settlement from appellate review"); *accord, e.g., Dewey v. Volkswagen of Am.*, No. 07-2249, 2013 WL 3285105, at *2 (D.N.J. Mar. 18, 2013) (following *Vaughn*); *Rougvie v. Ascena Retail Grp., Inc.*, No. CV 15-724, 2016 WL 6069968, at *4 (E.D. Pa. Oct. 14, 2016) (observing that a bond for $120,000 "may likely preclude pursuit of an appeal," a result that "appears to be the Class goal" but determining that approach to be "contrary to the right of any disappointed objector to file a notice of appeal").

Even if the Court had doubts about the appeal, this Court should not attempt to pre-judge whether the Seventh Circuit will find the appeal frivolous and impose sanctions. *In re Certainteed Fiber Cement Siding Litig.*, No. 2270, 2014 WL 2194513, at *1 n.2 (E.D. Pa. May 27, 2014) (discussing extant authority and finding that a "motion seeking to impose a Rule 7 cost bond is not the appropriate mechanism" to raise "concerns regarding the merits of and motivations behind the . . . objectors' appeal"); *In re Am. Inv'rs Life Ins. Co. Annuity Mktg. & Sales Practices Litig.*, 695 F. Supp. 2d 157, 166 (E.D. Pa. 2010) (denying cost bond to the extent it was based on the alleged frivolousness of the appeal: "the Court of Appeals is the best forum to litigate the merits of the appeal and to account for any frivolity that harms the plaintiffs").

The point is moot, however. Though Plaintiffs overtly hope that requiring a seven-figure bond would discourage the pending appeal, and though they load their memorandum with innuendo about discouraging "frivolous" proceedings, they do not and cannot demonstrate that McDonald's appeal is frivolous.

E. Mr. McDonald Has Standing to Appeal

Attempting to manufacture some type of irregularity, Plaintiffs imply that McDonald is not actually a class member entitled to object or appeal. First, Plaintiffs confidently assert that McDonald, because he did not intervene, is presumptively appealing only "on behalf of himself." Dkt. 2275 at 6; *see also id*. at 15 (McDonald, "who did not intervene to lodge his objection, cannot pursue the appeal on behalf of the whole Class.") But if Plaintiffs' theory were correct, then McDonald's appeal could not affect the class in any of the ways they complain about, and there would be no reason for a bond. Plaintiffs offer no explanation for why they would tell the Court the law is one thing, and then proceed as if it were another. Their motion for a bond is frivolous on its face.

Plaintiffs say coyly that they "do not concede that McDonald is even a Class Member, but reserve the right to explore that status more fully in future filings." *Id*. at 7, n.2. The support for this oblique charge is that McDonald filed a "duplicate claim" because he was "advised by claims administrator Gilardi & Co. LLC in December 2011 that his claim was rejected as duplicative of a claim filed by Vanguard on behalf of the Household TRIP plan." Dkt. 2275 at 13, citing Dkt. 2243, Ex. 1 (at 20 of 38). Plaintiffs make no attempt to explain why that would deprive McDonald of standing.

McDonald filed with his initial objection a declaration explaining, and attaching documentation showing, that he is the beneficial owner of the shares at issue and that he both: (1) made a claim himself, and (2) apparently had an earlier claim filed on his behalf. Dkt. 2243. Plaintiffs never disputed that Mr. McDonald was a class member entitled to object. On the contrary, in this very motion Plaintiffs report that Mr. McDonald has a claim estimated to be worth $1,734. Dkt. 2275 at 9. Plaintiffs not only conceded that McDonald is a class member,

Lead Counsel took particular credit for it. At the final approval hearing Lead Counsel bragged that they had ensured that employee-plan claimants such as Mr. McDonald were included in the class, concluding that "But for us, Mr. McDonald wouldn't be a class member." Transcript of Proceedings, October 20, 2016 at 44:15 – 20.

Despite all of that, Plaintiffs now say that Mr. McDonald had to intervene immediately upon learning of the existence of duplicate claims, lest he lose standing to appeal or his status as a class member. That is absurd: if McDonald were for not the owner of the shares and entitled to object as set forth in the notice, intervention would not make it so. Plaintiffs' argument is nonsensical, and their reservation of a "right" to explicate it "more fully" at some later time does not permit McDonald to respond to it now. Certainly, it does not supply any support for imposing a bond.

Plaintiffs are in any case wrong. *Devlin,* 536 U.S. at 14 (concluding that " nonnamed class members ... who have objected in a timely manner to approval of [a] settlement at [a] fairness hearing have the power to bring an appeal without first intervening."). Indeed, the Seventh Circuit has referred to a better-articulated standing argument as "frivolous," disposing of it without discussion. *Eubank v. Pella Corp.*, 753 F.3d 718, 729 (7th Cir. 2014). Regardless, if Plaintiffs believe that they have a determinative standing argument, then they can move to have the appeal dismissed with little delay, mooting concerns about a long appeal. It is telling that Plaintiffs have instead elected to ask this Court to issue a bond intended to prevent the appeal, on the basis of a standing theory they cannot explain.

F. Mr. McDonald's Objections Are Not Frivolous

Plaintiffs make an abortive attempt at characterizing the merits of McDonald's objections as frivolous. Their argument proceeds as if any gainsay of the settlement or fee award must necessarily be in bad faith. But McDonald's objections to the settlement were hardly frivolous, starting with the fact that the settlement notice was misleading because it incorrectly implied that Defendant could still challenge liability. Despite Plaintiffs' charge here, McDonald amply supported that assertion by citation. Dkt. 2242 at 15. As to the gross amount of the settlement,

Plaintiffs deride McDonald's estimate that the potential recovery in the case at trial could have been up to $5 billion, countering with their oft-repeated assertion that the settlement represents at least 75% of damages. But Plaintiffs obscure the distinction between principal damages and the potential recovery at trial. For example, of the $2.46 billion earlier judgment in this case, which applied to only about a third of the ultimate number of class members, only $1.47 billion was principal damages: the rest – nearly one billion dollars – was prejudgment interest. *See* Dkt. 1898 at 2 (Rule 54(b) judgment awarding "principal damages in the amount of $l,476,490,844.21 and prejudgment interest in the amount of $986,408,772.00 , for a total amount of $2,462,899,616.21."). The settlement is not nearly as rich as the Plaintiffs made out, and McDonald's objection to it was on-the-mark, particularly given the abject liability of the defendants and the harm that resulted. McDonald Supp. Decl., ¶¶3-7.

Nevertheless, after closely balancing the merits of proceeding with the objection to the settlement, Mr. McDonald is willing to agree to forego appealing from the approval of the settlement, if it will permit the distribution of funds to the class without further delay. *See* Declaration of Kevin McDonald filed herewith, at ¶16. That would render this proceeding moot, because Lead Counsel have already taken their fees and expenses from the fund.

Regarding the objection to the attorneys' fee, Plaintiffs' entire theory is that it was frivolous because McDonald did not fix upon a fee certain, but pointed out a "scattershot" range of precedents and theories, all of which would have resulted in a much lower fee. That argument is ridiculous. There is no rule that a fee objection is frivolous if it does not fix upon and advocate for a single alternate fee. The point of McDonald's argument is that the fee was approximately two to five times too high, not just under Seventh Circuit precedent but upon any possible alternative theory.[7] That is a completely reasonable approach and, if the Seventh Circuit agrees, the fee will be reversed and the excess returned to the class.

[7] To the extent McDonald asserted theories not currently recognized by the Seventh Circuit, he did not attempt to obscure that fact, and Plaintiffs seem to forget that there is one court higher than the Seventh Circuit. Plaintiffs themselves repeatedly assert, for example, that the Seventh Circuit's "market-based" approach to determining common fund fees is different from other Circuits. McDonald argues that to the extent there is any distinction, it does not support the fee award here. Plainly, given the acknowledged conflict among litigants and Circuit courts on

Nor is it likely that a genuinely frivolous appeal would cause much delay. As the Eleventh Circuit observed in *Pedraza*, "appellate courts may on motion dismiss frivolous claims at the outset (that is, before substantial fees are incurred)." *Pedraza*, 313 F.3d at 1333 n.14 (citing *In re Am. President Lines, Inc.*, 779 F.2d 714, 717 (D.C. Cir. 1985) ("The traditional countermeasure for an appeal thought to be frivolous is a motion in the appellate court to dismiss, which is available at the outset of the appeal and before expenses thereon begin to mount."). If Plaintiffs really believe McDonald's appeal is frivolous, they should seek relief from the Seventh Circuit.

G. Objection to "Joint-and-Several" Liability of McDonald's Counsel

McDonald notes that the motion requests the entry of a bond "jointly and severally" among McDonald and his counsel. There is no authority or reason to order McDonald's *counsel* to post an appeal bond. The rule provides that "the district court may require an appellant to file a bond or provide other security…." It does not provide, nor does logic suggest, that the bond should be imposed on the lawyers representing that appellant.

McDonald assumes this request is poorly-converted boilerplate from an earlier appeal in which there was more than one appellant, and the motion sought to impose joint and several liability among the appellants. But even then, courts have refused to impose joint and several bond requirements in cases in which more than one objector appeals. *See Rougvie v. Ascena Retail Grp., Inc.*, No. CV 15-724, 2016 WL 6069968, at *3 (E.D. Pa. Oct. 14, 2016); *cf. In re Toyota Motor Corp. Unintended Acceleration Mktg., Sales Practices, & Prod. Liab. Litig.*, No. 8:10ML02151 JVS FMOX, 2013 WL 5775118, at *2 (C.D. Cal. Oct. 21, 2013) (observing, in the course of denying bonds altogether, that imposing full bond on each of four appellants would impermissibly result in bonds for four times the potential recoverable costs).

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determining reasonable percentage-based fee awards in common-fund cases, McDonald's points are hardly frivolous.

H. Conditional Request for a Stay

If the Court intends to impose a large bond encompassing administrative expenses or interest on the common fund, McDonald would request that the Court also stay the order requiring a bond, pending appeal of the bond order itself. McDonald will seek immediate review of such an order so that the Seventh Circuit can resolve the issue whether administrative expenses or interest are permitted to be included. However, to move for a stay of the bond order pending review, McDonald must first seek a stay in this Court. See Fed. R. App. P. 8(a)(1) and (2). Thus, if this Court will either (1) stay the bond pending appeal, or (2) explicitly deny a stay, doing so would eliminate any delay attending the requirement to seek that relief from this Court in the first instance.

III. CONCLUSION

Plaintiffs' motion for an appellate bond is without legal merit and finds Plaintiffs pressing contradictory and incoherent arguments not based in the record of this case or upon the applicable law. Plaintiffs' overreach is egregious, asking this Court to impose delay interest without any authority for it, and upon over $420 million already in Lead Counsel's possession. The request is plainly interposed for the improper purpose of preventing review of Lead Counsel's fee by any means.

McDonald submits that this Court should reject the motion altogether, for Rule 7 does not require the Court to impose a bond. The rule says a district court "may" require a bond for costs on appeal, not that it "shall" do so. It is appropriate to deny an appeal bond where the applicant neither adequately justifies the amount sought, nor shows that the appellant cannot be trusted to pay the small amounts taxable under Rule 39. *Pan American Grain Mfg. Co. v. Puerto Rico Ports Authority*, 193 F.R.D. 26, 43 (D. P.R. 2000). At most, this Court might exercise its discretion to require security to cover the $500 in expected Rule 39(e) costs and, if so, no formal bond order is necessary: Mr. McDonald would agree to pledge his recovery in the case, estimated at $1,734. Dkt. 2275 at 9. McDonald Supp. Decl., ¶18.

Date: January 20, 2017

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on January 20, 2017, I authorized the electronic filing of the foregoing with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the email addresses for counsel of record denoted on the attached Service List. I certify under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Date: January 20, 2017

s/ John W. Davis
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Jaffe v. Household Int'l, Inc., No. 02-5893 (N.D. Ill.)

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